

FILED
CLERK

5/20/2019 8:55 am

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

-----X **Docket#**
UNITED STATES OF AMERICA, : 13-cr-00607-JFB
:
- versus - : U.S. Courthouse
: Central Islip, New York
:
KENNER, et al., : May 15, 2019
Defendants : 1:22 PM
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government:

Richard P. Donoghue, Esq.
United States Attorney

BY: **Nicole Boeckmann, Esq.**
Assistant U.S. Attorney
100 Federal Plaza
Central Islip, NY 11722

For the Defendant:

Philip Kenner, pro se
No. 07480-408
MDC Brooklyn
Metropolitan Detention
Center
P.O. Box 329001
Brooklyn, NY 11232

Transcription Service:

Transcriptions Plus II, Inc.
laFerrara44@gmail.com

Proceedings recorded by electronic sound-recording,
transcript produced by transcription service

Proceedings

1

2

THE DEFENDANT: Good afternoon, your Honor.

3

4

THE COURT: Good afternoon, Mr. Kenner. We're just going to call the case. Everyone could stay seated because we're recording it.

5

6

THE CLERK: Calling case 13-cr-607, USA v. Kenner.

7

8

Please state your appearance for the record.

9

10

11

MS. BOECKMANN: Good afternoon, your Honor. Nicole Boeckmann on behalf of AUSA Matthew Haggans for the United States.

12

13

THE COURT: Good afternoon, Ms. Boeckmann.

14

THE DEFENDANT: Phil Kenner, defendant.

15

16

17

18

19

20

THE COURT: Good afternoon, Mr. Kenner. So I scheduled this, Mr. Kenner, because I received an ex parte letter from you indicating that you were in the SHU and discussing the whole issue with the jump drive. I did also receive a letter from your girlfriend indicating the same thing -- your fiancé, I think it is.

21

THE DEFENDANT: Yes, sir.

22

23

24

25

THE COURT: So I docketed the letter from the fiance. I didn't docket yours because you asked that it be ex parte, although I was going to disclose it to the government, just so they can look into the whole

Proceedings

1 situation but I think the government should -- have you
2 had a chance to look into it?

3 MS. BOECKMANN: We have, your Honor.

4 THE COURT: Okay.

5 MS. BOECKMANN: I spoke to Mr. Haggans this
6 morning, who has been in contact with Nicole McFarland
7 (ph.), who is one of the staff attorneys at the
8 Metropolitan Detention Center. She is actually not at
9 the MDC. She is at a conference in Colorado but has been
10 in contact with the facility.

11 They are right now working through the process
12 of having Mr. Kenner removed from the SHU, and having the
13 disciplinary expunged. Mr. Haggans did do a review. Mr.
14 Kenner is correct, he was given access to this particular
15 drive at some time. So it seems to have been an error on
16 the part of the MDC, which they are working to rectify.

17 However, I was told that because of the size of
18 the thumb drive that he had, they will not permit that.
19 They'll permit the material. They are going to give us
20 back the thumb drive, and ask that we put it on an
21 external hard drive instead to return to him based on the
22 size of the particular device.

23 I don't know whether because it is so small,
24 they feel it can be secreted somewhere. I am not exactly
25 certain what their concern is with that but we can

Proceedings

1 certainly do that in short order.

2 But it's my understanding that they are in the
3 process of --

4 THE COURT: Well let me --

5 MS. BOECKMANN: -- reversing what they had
6 done.

7 THE COURT: Yeah. I would just -- and I
8 appreciate -- you can thank Mr. Haggans for looking into
9 it quickly but the -- two things is, first of all, I'm a
10 little concerned when I hear reverse -- reverse the
11 process. I don't want him to be in the SHU for days
12 because they're trying to --

13 MS. BOECKMANN: No, she was trying to make it
14 happen. I was hoping it was going to be done by the time
15 I was up here.

16 THE COURT: All right.

17 MS. BOECKMANN: I didn't hear that it was. My
18 hope is that -- I hate to ever promise anything on behalf
19 of a facility that I am not in charge of, but they
20 understand the urgency and that it should be done today.

21 THE COURT: Okay. Yes, if he's not out of the
22 SHU by the end of the day today, then just tell this on
23 the phone, I want to know why.

24 MS. BOECKMANN: Right.

25 THE COURT: It's clear it was an error.

Proceedings

1 MS. BOECKMANN: Yes.

2 THE COURT: And my second issue that I want you
3 to convey back to her is -- and how long -- when did this
4 start, Mr. Kenner? What was the first day?

5 THE DEFENDANT: The end of April.

6 THE COURT: So, I don't understand why --

7 THE DEFENDANT: It's about 16 days, your Honor.

8 MS. BOECKMANN: I think we only became aware of
9 it --

10 THE COURT: No, I am not criticizing you --

11 MS. BOECKMANN: Yes.

12 THE COURT: -- but --

13 MS. BOECKMANN: No, I know.

14 THE COURT: -- I want you to tell her that
15 whatever, you know, internal mechanism there are for
16 someone looking into -- when he's telling them that this
17 is an error, I got this from the government, it shouldn't
18 have taken them 16 days to -- and if he didn't reach out,
19 who knows how long it would have been before them --

20 MS. BOECKMANN: That's --

21 THE COURT: -- to verify whether what he is
22 saying is true. It just seems to me -- you know, we're
23 not talking about, you know, contraband where he had
24 drugs or something like that. He had a flash drive that
25 he said was discovery. You would think before putting

Proceedings

1 someone in the SHU, that they would call the United
2 States Attorney's Office to see whether or not what he is
3 saying is true or not. I'm just shocked that something
4 as basic as that when you're dealing with -- you know,
5 they know that discovery goes in and out of the jail
6 electronically. So that is, to me, not acceptable.

7 I mean, maybe there's more to the story on
8 their end as to why they didn't believe what Mr. Kenner
9 was telling them, but you know on its face, it seems like
10 this could have been cleared up, you know, within one
11 phone call in hours, not 16 days but I don't know if
12 there's anything you want to add, Mr. Kenner, to that
13 issue.

14 THE DEFENDANT: Yes, your Honor, and I
15 appreciate your compassion for that because it's been a
16 -- it's been a very difficult situation being in complete
17 isolation for that period of time.

18 THE COURT: Well, why didn't they believe you?
19 Do you know why they didn't believe what you were telling
20 them or --

21 THE DEFENDANT: The short version of the event
22 was they called me and told me to get ready to go work on
23 my case, which I walked from the building that all the
24 inmates are in to the east building into the visiting
25 room. So I picked up my materials, this bag but in the

Proceedings

1 paper form, as you'll remember that was a problem, and
2 when I went out in the hallway, they said let me see your
3 papers, very typical. I handed it to them, and they said
4 turn around, put your hands behind your back.

5 I said, "Can you tell me what's going on?"

6 The Lieutenant said -- Lieutenant Perry said,
7 "You have contraband. It was found in your possession in
8 the East visiting room with all your discovery."

9 I said, "Lieutenant Perry, there's no
10 contraband in my discovery. It's the same stuff that's
11 been there for four-and-a-half years."

12 He said, "Take it up with the disciplinary
13 officer. He'll come see you in the next month."

14 I said, "But Lieutenant, it's -- it can't be
15 anything."

16 He goes, "It was a flash drive."

17 I said, "It's a flash drive? It said -- it has
18 the password Kenner2015! right on the package."

19 He said, "I don't care what you say. You've
20 got to take it up with disciplinary. You're getting a
21 shocked."

22 And I said, "Okay."

23 And then they put me up there. I spoke to
24 effectively each person that walked by the SHU unit, and
25 I told them -- half of the staff was compassionate, and

Proceedings

1 said "What a bunch of idiots." The other half said, "Not
2 my problem. You've got to take it up with the DHO when
3 they get here."

4 I was told the DHO can show up anytime in the
5 first 30 days. In 16 days, I haven't seen the DHO yet.

6 I explained to each person that it had the
7 government password written right on the package, and
8 it's a jump drive, and if they open it up, the best of my
9 recollection was that it was privilege log material that
10 the government had given me somewhere in the first
11 quarter of 2015, while I was at Queens. And that the
12 U.S. Marshals had delivered that with my computer, the
13 external hard drives, the discs, all to MDC, and as -- if
14 your Honor recalls, about a week later, they told me that
15 all the materials were available for discovery use
16 pretrial at that point. So --

17 THE COURT: Have you had other issues with that
18 -- I know you had issues with certain officials at the
19 jail or time that you've told me about, but is it --

20 THE DEFENDANT: Your Honor, I appreciate again
21 your recollection of that. It's -- I'm working through
22 those issues the best I can.

23 THE COURT: Okay.

24 THE DEFENDANT: There's some very wonderful and
25 compassionate people over there that know the struggle

Proceedings

1 it's been, and at the moment, I am getting as much time
2 as I can muster up with the help of the good people.

3 THE COURT: All right.

4 THE DEFENDANT: The other thing I just wanted
5 to raise for your Honor's knowledge is that I appreciate
6 that they're going to send the jump drive back to the
7 government, they're going to put it on a hard drive, and
8 send the hard drive in, but if your Honor recalls, about
9 six to nine -- and I appreciate that, and that's all we
10 could ask for. I just want to refresh your recollection
11 that about six to nine months ago -- excuse me about a
12 year ago now, I had told your Honor that one of the
13 officers had stolen one of the external hard drives that
14 the government had given us, terabyte drives, back at
15 GEO, and that they refused to acknowledge where it went
16 or why it was missing.

17 And then when we had asked your Honor for a
18 replacement to be able to backup the computer, if you
19 remember that, MDC said that we could not have a backup
20 hard drive because hard drives are illegal.

21 THE COURT: Right.

22 THE DEFENDANT: And we said it's just going to
23 be a hard drive that sits in the discovery box with a 12-
24 inch cable that plugs in, so we can backup the computer,
25 and they made it a real hard deal about it, and continue

Proceedings

1 to cause trouble for my paralegal when he's come on
2 several occasions saying you didn't -- you had
3 authorization to come as a person but you didn't get
4 authorization to bring the backup hard drive.

5 So I find it a little bit ironic that it's a
6 simple solve for Ms. McFarland -- and I -- just so your
7 Honor knows, I wrote to her three times from the SHU and
8 said can someone please just please plug the jump drive
9 in? It's got the password right on the package from the
10 government. You'll see it's privileged material, and the
11 jump drive is locked.

12 THE COURT: Well --

13 THE DEFENDANT: Because there is an issue at
14 the jail, your Honor, that if you had a jump drive where
15 you could put porn or other, you know, contraband on it,
16 and you could transport it throughout the -- I don't know
17 what you do with it when you have it on there. I've got
18 the only computer, as far as I know but that's why they
19 don't want an unlocked device but this is a locked device
20 by the government. It's no different than --

21 THE COURT: I'm not suggesting that they
22 shouldn't be concerned when they saw it but as soon as
23 you tell them it's discovery, I would expect that whoever
24 you're telling that to -- I don't know why -- I don't
25 know whether those letters got to Ms. McFarland or not

Proceedings

1 but that's the part that bothers me.

2 But in any event, so just -- I know we've gone
3 -- I know we've had a lot of different issues in terms of
4 what they allow and don't allow but I just want to make
5 sure what Ms. Boeckmann is now proposing, that's not
6 going to create any issues for you, as long as they
7 follow through on that, right?

8 THE DEFENDANT: That's fantastic, your Honor.

9 THE COURT: All right.

10 MS. BOECKMANN: And I am going to have Mr.
11 Haggans reconfirm with the MDC exactly what type of
12 device they want, and what kind of labeling they want on
13 it, since it sounds like they at one point had the
14 external hard drive, requested this, and now they want to
15 go back --

16 THE COURT: Right.

17 MS. BOECKMANN: -- to what's happened before.
18 They certainly, you know, do change their policy on
19 electronic data from time to time, but I will have him
20 clarify that and I will express to her, the Court's
21 concern about the 16-day delay and why this wasn't
22 addressed immediately, being that he claimed it was
23 discovery and it was labeled in the fashion it was
24 labeled.

25 THE COURT: All right. Let me just -- while I

Proceedings

1 have you and Mr. Kenner, I just want to make sure that
2 there's no other issues we can address but I did want to
3 -- hopefully your paralegal will give you these but these
4 just came in.

5 So as you know, the government has been through
6 first Magistrate Judge Brown and now Magistrate Shields,
7 trying to have a dialogue with the third-parties
8 regarding the wording of any potential preliminary order
9 of forfeiture. I know you wanted to participate in those
10 discussions but they don't have any obligation -- I mean,
11 they could include you if you want but because it's
12 really their negotiations with each other of the
13 government trying to address their concerns about the
14 language, it's not something that they are required to
15 allow you to participate in but I did want to make sure
16 that the fruits of those discussions, which now are being
17 conveyed to me, that you have those documents.

18 So if --

19 THE DEFENDANT: Your Honor, if I could let you
20 know, the -- Magistrate Shields was wonderful. She
21 brought me to court yesterday.

22 THE COURT: Oh, good.

23 THE DEFENDANT: And I sat in, at least on the
24 interaction between the parties. I understand the
25 contempt between both sides.

Proceedings

1 THE COURT: Okay, so that's --

2 THE DEFENDANT: They did let me leave with, I
3 think it was document 607, and some of the alterations.

4 THE COURT: Well, the government submitted May
5 -- I think it might have been today -- I have it in my
6 chambers, if the marshals will just hold you a minute,
7 we'll give you a copy of it.

8 THE DEFENDANT: Thank you.

9 THE COURT: But what they said was the
10 recommendation of Judge Shields was to what the language
11 should be, so they submitted a proposed new preliminary
12 forfeiture order, and then today, one of the -- counsel
13 for Danske Bank -- I don't know how you pronounce that.

14 THE DEFENDANT: [Dan-ska].

15 THE COURT: Danske, said that that wasn't
16 really like a -- there was no recommendation from Judge
17 Shields. That the government is overstating what
18 occurred.

19 So I will give you a copy of their letter, and
20 the government's letter, so you could start reviewing
21 that, and if any of that creates any issues for you, and
22 I don't know whether now there's going to be more
23 discussion, I may have to have a conference with
24 everybody here to address that but we'll give you this
25 paperwork, and you can always write me if you have some

Proceedings

1 commentary on it, okay?

2 THE DEFENDANT: Thank you, your Honor.

3 THE COURT: All right. So are there any
4 other --

5 MS. BOECKMANN: The only other thing I wanted
6 to raise, your Honor, is in having been asked by Mr.
7 Haggans to cover this, and having been here when the case
8 was tried in 2015, I was inquiring to him sort of where
9 we were at, and he had mentioned that probation had been
10 asked to do some updates.

11 I then followed-up with probation just to see
12 where they were at, and they had only been given a
13 request with respect to Mr. Constantine. I did ask them
14 at that point to do one for Mr. Kenner, as well. I
15 didn't know if the Court wanted that but I was concerned
16 that when we get to the point that we're ready to be
17 sentenced, probation was telling me it takes them
18 sometimes several months to do an update. I'm not
19 exactly certain why that is. I'm sort of pressing them
20 on that because I am trying to get everybody poised, so
21 that all the documentation is done once the forfeiture
22 litigation has come to fruition.

23 THE COURT: Yeah, that was my goal too, and
24 what happened was that we had a conference many months
25 ago where I thought Constantine's PSR was going to be

Proceedings

1 updated. He was going to be interviewed, and was going
2 to be updated, and for whatever reason, that did not
3 happen, and then it was brought to my attention that that
4 did not happen, and then they did ask -- I forgot how
5 much time they asked for but that's -- I gave them more
6 time prepare it.

7 I didn't -- you know, obviously updating a
8 report is more important when someone is out on bail
9 because they have more information to report. I'm not
10 sure what the update of Mr. Kenner would reflect but --

11 MS. BOECKMANN: Yeah, it would only be any
12 disciplinaries while he has been in jail but mostly I
13 wanted to find out whether or not the Court wanted one.

14 THE COURT: No.

15 MS. BOECKMANN: And if they did -- if they
16 (sic) don't want one, then I can let them know but when I
17 checked with them --

18 THE COURT: Yeah.

19 MS. BOECKMANN: -- they said they only had a
20 request for Mr. Constantine.

21 THE COURT: Yeah, Mr. Constantine's lawyer had
22 requested it, and I thought it was reasonable given it's
23 been years, and they wanted to document what he has been
24 up to, I think, from a positive stand point but Mr.
25 Kenner, unless you tell me you want an update done, I

Proceedings

1 don't see any point to updating your PSR.

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Okay.

4 THE DEFENDANT: There's been no disciplinary
5 action --

6 THE COURT: Okay.

7 THE DEFENDANT: -- until this last 16 days.

8 THE COURT: All right.

9 MS. BOECKMANN: Okay.

10 THE COURT: So to your answer your question --

11 MS. BOECKMANN: Excellent.

12 THE COURT: -- the forfeiture part of it, I
13 have been awaiting the resolution of these ongoing
14 negotiations and I haven't fully digested what I am going
15 to do now because it appears like there was some progress
16 from your office's letter to me.

17 MS. BOECKMANN: Yes.

18 THE COURT: But then I got this letter today,
19 suggesting that there may be -- so I think I'm probably
20 going to have a conference in the next couple of weeks to
21 address whether there's any additional progress that
22 could be made on that, and you know, the bottom line is
23 that I wanted to make sure that there were going to be --
24 if the Court were to order some type of forfeiture the
25 government were requesting, that there were not going to

Proceedings

1 be unintended consequences to innocent third parties that
2 were going to take place simply because of the procedure
3 in a forfeiture action of them only being able to object
4 after --

5 MS. BOECKMANN: Right.

6 THE COURT: -- the order, and when you're
7 dealing with properties of these sizes, and timeshares,
8 and all sorts of issues like the banks, I was concerned
9 that your team was not fully aware of what some of the
10 unintended consequences financially might be, including
11 to the victims.

12 MS. BOECKMANN: Right.

13 THE COURT: So that was the whole goal of this
14 was for them to sit down with the banks, and have a
15 magistrate judge help try to bridge the gap.

16 So I am going to speak to Judge Shields just to
17 see, you know, what transpired, and then we'll have a
18 conference on that in the near future, and then -- but my
19 goal was what you suggested, have a sentencing
20 documentation and Mr. Kenner's objections are in, and --

21 MS. BOECKMANN: Yes, Mr. Haggans said there was
22 something scheduled to handle the objections to Mr.
23 Kenner's report. He thought there was already.

24 THE COURT: Yeah.

25 MS. BOECKMANN: A conference.

Proceedings

1 THE COURT: You don't have something further
2 you're putting in -- on the PSR, you put in your
3 objections, right?

4 THE DEFENDANT: The objections had been
5 submitted a while back.

6 THE COURT: Yeah.

7 THE DEFENDANT: And I think she may be
8 referring to oral arguments --

9 MS. BOECKMANN: Yes.

10 THE COURT: -- on or about June --

11 MS. BOECKMANN: On the objections, correct.

12 THE COURT: On the objections.

13 MS. BOECKMANN: Yes.

14 THE DEFENDANT: On the objections, 11th or
15 12th.

16 THE COURT: Right.

17 MS. BOECKMANN: Yes.

18 THE DEFENDANT: I don't recall.

19 THE COURT: So that's the next step.

20 MS. BOECKMANN: Okay. I just wanted to -- I
21 was mostly checking in with probation and making sure
22 that --

23 THE COURT: No, I appreciate that but we'll
24 double-check just to make sure it's not further delayed
25 than I thought it was.

Proceedings

1 MS. BOECKMANN: Mr. Constantine's they said is
2 underway.

3 THE COURT: Okay.

4 MS. BOECKMANN: I just think -- they then told
5 me about Mr. Kenner --

6 THE COURT: Okay.

7 MS. BOECKMANN: -- and I didn't -- having not
8 been present, I just didn't know what the status was, and
9 I wanted to alert the Court that they didn't have a
10 request, so in the event you wanted one, I wanted to get
11 that started, and if you don't, I can let them know
12 there's --

13 THE COURT: All right.

14 MS. BOECKMANN: -- everything is as is.

15 THE COURT: Yep.

16 MS. BOECKMANN: Terrific.

17 THE COURT: Okay. Mr. Kenner, do you have any
18 other issues for today?

19 THE DEFENDANT: Not for today, your Honor.
20 There's a few open items. I will just address them in a
21 letter to you.

22 THE COURT: Okay.

23 THE DEFENDANT: And again, thank you for
24 intervening on this issue.

25 THE COURT: Yes, sure. And I was going to try

Proceedings

1 to bring you in on Monday but I wanted to give the
2 government some time to look into it because otherwise,
3 usually I can't do anything until they've had a chance to
4 look into it, so I apologize that even after you told me,
5 there was some additional couple of days. I know every
6 day in there is unpleasant.

7 But I would just ask -- and this is not -- I
8 don't want you to take this as a criticism, when you're
9 submitting things to me, just -- I would not overuse the
10 ex parte, making them ex parte. Unless it's reviewing
11 some defense -- some strategy of what you're about --
12 you're asking me about, if it deals with your paralegal
13 and what you wanted to do, those are the things that
14 would be in the ex parte category.

15 THE DEFENDANT: Okay.

16 THE COURT: But if it's objections, if it's
17 anything where I'm going to need the government to
18 respond to, then don't label it ex parte because this --
19 and this is a good example. You labeled it ex parte and
20 I wanted the government to see it right away because I
21 knew they would realize this is a mistake but then I
22 wasn't sure if there wasn't something in here that you
23 didn't want them to know, so I didn't want to give them
24 your letter without your permission.

25 THE DEFENDANT: I understand.

Proceedings

1 THE COURT: So just be cognizant of -- if the
2 letter is not really revealing anything, or they're going
3 to get an advantage because they know what you're
4 doing --

5 THE DEFENDANT: Okay.

6 THE COURT: -- don't label it ex parte, so that
7 I can have their input, make them, you know, respond to
8 it, okay?

9 THE DEFENDANT: Okay. I understand and --

10 THE COURT: All right.

11 THE DEFENDANT: -- thank you for the clarity,
12 your Honor.

13 THE COURT: So I may wait until the June date
14 to address the forfeiture issue. I may have a conference
15 earlier but obviously you're free to make any written
16 submissions you want prior to that date, okay?

17 THE DEFENDANT: Yes, sir, your Honor.

18 THE COURT: All right. Thank you.

19 THE DEFENDANT: Thank you so much.

20 MS. BOECKMANN: Thank you.

21 THE COURT: Sure.

22 (Matter concluded)

23 -o0o-

24

25

C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 18th day of May, 2019.


Linda Ferrara

AAERT CET 656
Transcriptions Plus II, Inc.